No. 92-1384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BARCLAYS BANK PLC,

Petitioner,

v.

FRANCHISE TAX BOARD, AN AGENCY OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

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MOTION OF THE GOVERNMENT OF THE UNITED KINGDOM FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AMICUS CURIAE AND ACCOMPANYING BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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October 15, 1993

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

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MOTION OF THE GOVERNMENT OF THE UNITED KINGDOM FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AMICUS CURIAE AND ACCOMPANYING BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Government of the United Kingdom respectfully moves this Court for leave to file a supplemental brief *amicus curiae* (attached hereto) in support of the petition for a writ of certiorari.

Significant international developments not discussed in the Brief for the United States as *Amicus Curiae* have occurred in the instant case since the filing of the petition for certiorari and the original supporting briefs *amicus*

curiae. On May 13, 1993, the British Government announced that it would have to take retaliatory measures against certain U.S. corporations if the matter of worldwide unitary taxation of foreign-owned companies was not satisfactorily resolved in California by the end of this year. That retaliatory action was deferred following California's legislative changes. However, it is important to note that the British Government has made clear that it will retaliate if it is found that the legislation is being applied in a way which exposes U.K.-owned companies to damage from taxation that is inconsistent with the arm's length principle.

The Government of the United Kingdom respectfully requests the opportunity to apprise this Court directly of the foreign policy implications of the developments that have occurred, and also to register the view that the unitary tax problem has not yet been completely resolved.

In that regard, the United States has suggested that California's legislative changes have produced an "accommodation of state, national and international interests" on the constitutional issue posed in the instant case. (Brief for United States as *Amicus Curiae*, p. 10.) Insofar as the Government of the United Kingdom is concerned, such an "accommodation" cannot be complete until the internationally accepted arm's length principle is endorsed, on a permanent basis, as the only valid method of taxing foreign companies in any State. At present, worldwide unitary taxation remains the basic method of taxation in California and exists, in some form, in at least six other states and could be imposed in any other. Contrary to the statement of the United States, therefore, the case continues to be of present and future relevance.

In addition, the Government of the United Kingdom is also concerned that, absent review by this Court, California will retain over $500 million already collected from (and another $400 million assessed against) foreign-owned corporations under a taxing scheme that this Court suggested in 1983 was constitutionally suspect.

The need for review by this Court arises because the lower courts in the instant case completely disagreed on the proper application of the "one voice" test. Indeed, the United States has concluded that the presently controlling decision of the California Supreme Court is "subject to serious question." (Brief for the United States as *Amicus Curiae*, p. 8.) Surely constitutional issues that so directly affect relations between nations warrant definitive resolution by this Court, not merely by lower state courts that cannot agree among themselves. Without such definitive resolution, there can be no complete solution for the future.

CONCLUSION

For the foregoing reasons, the Government of the United Kingdom respectfully requests that this Court grant its motion for leave to file a supplemental brief *amicus curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

/s/ Jerome B. Libin

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

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SUPPLEMENTAL BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Government of the United Kingdom, as *amicus curiae*, wishes to apprise this Court of the foreign policy implications of developments since the filing of the petition for a writ of certiorari.

On May 13, 1993, the then Chancellor of the Exchequer, Rt. Hon. Norman Lamont, M.P. announced that the Government of the United Kingdom would have to take retaliatory measures in relation to U.S.-based companies if a satisfactory solution to the problem of worldwide unitary taxation in California were not reached by December 31,

1993 (Appendix A). Following that announcement, the U.K. Board of Inland Revenue notified 900 major U.S. corporations with U.K. subsidiaries of the various retaliatory options available under the U.K. enabling legislation (Appendix B). Subsequently, the California Legislature enacted certain modifications to its taxing scheme, effective January 1, 1994. The new legislation did not, however, remove California's worldwide unitary tax as the basic method of taxation for foreign-owned groups (albeit with an election for an alternative). The Chancellor of the Exchequer, in a letter of September 14, 1993 to Secretary of the Treasury Bentsen stated that the United Kingdom would defer acting upon its threat of retaliatory action, rather than lifting it, pending satisfactory application of the California legislation. Consequently, in his public statement of September 15, 1993 (Appendix D), the Chancellor of the Exchequer stated that:

> [G]iven the defects that remain in the law, it will be important to ensure that the spirit of the new approach is followed in the detailed regulations and in the practical application of the law. The UK will therefore defer retaliatory action and will retaliate only if it is found that the legislation is being applied in a way which exposes UK owned companies to damage from taxation that is inconsistent with the arm's length principle.

In addition to the foregoing, on June 30, 1993, the Finance Committee of the German Bundestag requested that the German government consider what retaliatory steps might be taken if a satisfactory solution to the "problem of unitary taxation as applied in the State of California" has not been found by the end of 1993 (Appendix C). This request has not been rescinded.

Furthermore, on September 24, 1993—two weeks after passage of the California legislation—the Embassy of Belgium, on behalf of the Member States of the European

Community and the Delegation of the Commission of the European Communities, sent a Demarche to Secretary of State Christopher in which it was stated that, "[w]hile this legislation is an improvement, the Member States and the European Commission do not consider that the unitary tax problem is solved." (Appendix E.) On October 14, 1993, all the Member States of the EC in addition to the Governments of Australia, Austria, Canada, Finland, Japan, Norway, Sweden and Switzerland sent a Demarche to the Secretary of State affirming their opposition to "[w]orldwide unitary taxation, which is . . . disruptive of international economic relations." (Appendix F.)

The Government of the United Kingdom is unaware of any state taxing scheme that has ever given rise to the international concern that worldwide unitary taxation has. To the major trading partners of the United States, the continued use of such a taxing scheme, which results in the taxation by a state, as in the case of California, of profits earned entirely outside the U.S., is unacceptable for reasons previously set forth.

In *Container Corp.* v. *Franchise Tax Board*, 463 U.S. 159 (1983), this Court declared that a state tax would violate the "one voice" test set down in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), "if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive." (*Container Corp.* at 194, emphasis in original.) This Court then went on to state that "The most obvious foreign policy implication of a state tax is the threat it might pose of offending our foreign trading partners and leading them to retaliate against the Nation as a whole." (*Id.* at 194, citing *Japan Line* at 450.)

The Government of the United Kingdom believes that the international developments described above could provide no clearer indication of the severe foreign policy implications of California's system of worldwide unitary tax.

These developments dramatically underscore the concern of the United States itself, so clearly expressed in its *amicus curiae* brief filed in August 1992 at an earlier stage of the instant case:

> California's application of its worldwide combined reporting method of taxation to compute the income tax of members of foreign-controlled unitary corporate groups violates the Commerce Clause under this Court's analysis in *Container Corp.* because California's unilateral action departs from an accepted international practice to which the United States adheres and prevents the United States from speaking with one voice on this sensitive and important matter of foreign commercial relations.

Brief of the United States as *Amicus Curiae* In Support of Petitioner, pp. 12-13, Docket No. 92-212.

The United Kingdom Government's position on retaliation, which is not fully reflected by the Franchise Tax Board in its supplemental brief to this Court, is as stated by the Chancellor on September 15, 1993:

> While the legislation in California is a significant step forward, on its own it does not provide a complete solution to the unitary tax problem. For a complete solution it will be necessary to have the internationally accepted arm's length principle endorsed, on a permanent basis, as the only valid method of taxing foreign companies in any State. Success for the Barclays case in the Supreme Court would achieve this. The Government will continue strongly to support Barclays' case. I hope it will succeed. If it does not, the UK will have to retain its retaliatory powers in reserve as a barrier against the possibility that States might damage UK owned companies by the imposition of unitary taxation at some time in the future.

In view of this, and so long as worldwide unitary taxation remains the basic method of taxation in California (albeit with an election for an alternative) and exists, in some form, in at least six other States and could be imposed in any other, the Government of the United Kingdom does not consider that there has been an "accommodation of state, national and international interests" regarding the issues presented in the instant case.[1]

The United Kingdom is seriously concerned that California could retain $900 million of taxes paid or owing by foreign-owned corporations under a taxing scheme validated only by a state court decision which the United States itself admits is "subject to serious question." (Brief for the United States as *Amicus Curiae*, p. 8.)

Important principles of Federal constitutional law, with extremely serious international implications, are at stake. In light of this Court's previously expressed concerns regarding the application of worldwide unitary taxation to foreign-owned companies, allowing inferior state courts to have the final say as to the constitutional validity of California's taxing scheme seems fundamentally unfair to the taxpayers involved.

At the very least, further clarification of the application of the Foreign Commerce Clause would seem to be called for where foreign policy issues are so directly implicated

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[1] In its supplemental brief, the Franchise Tax Board refers to what were "apparently" the "three major concerns" of the United Kingdom and the European Economic Community with the 1986 California water's edge method (all of which concerns have been allayed, it then states, by the California legislation passed in September 1993). However, the position of the Government of the United Kingdom has always been that for a complete solution it would be necessary to have a permanent endorsement of the arm's length principle as the only valid method of taxing foreign companies in any State.

and lower state courts appear totally confused by this Court's prior pronouncements on the application of the "one voice" test.

CONCLUSION

For all of the foregoing reasons, the Government of the United Kingdom respectfully urges this Court to grant the petition for a writ of certiorari in the instant case.

Respectfully submitted,

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Counsel for the Government of the United Kingdom

October 15, 1993

APPENDIX

APPENDICES

Appendix A

May 13, 1993, Statement of the Chancellor of the Exchequer, Rt. Hon. Norman Lamont, M.P.

US Treasury Secretary Bentsen has explained the US Administration's position. He and his colleagues recognize the importance the Government attaches to this issue, the strength of feeling in the UK and the risk of retaliatory action by the UK if a satisfactory solution is not forthcoming. He has assured me that the Administration are very keen to find a solution to this problem that is acceptable. I have said that the Government is ready to discuss how an acceptable solution could be best achieved. But I have informed him that the Government will have to take retaliatory measures in relation to United States based companies if there is not a satisfactory resolution of the problem of the internationally-opposed unitary tax on foreign-owned companies in California by the end of this year. Meanwhile, I have instructed the Inland Revenue to obtain information from California-based companies in the UK, on the probable impact of such retaliatory measures.

Appendix B

Letters from Ian Spence, Director International Division, Inland Revenue, dated June 3, 1993 and June 25, 1993, to U.S. corporations with U.K. subsidiaries and to U.K. subsidiaries of U.S. corporations, respectively.

Chief Executive Officer
[address]

3 June 1993

Dear Sir/Madam,

I am writing to you in connection with the issue of Unitary Taxation. As you may know the UK Government have announced that they will have to take retaliatory measures in relation to United States based companies if there is not a satisfactory resolution of the problem of the internationally opposed unitary tax on foreign owned companies in California by the end of the year. I enclose a copy of the press release issued on the day of the announcement, which reproduces the Chancellor's statement in full and gives some of the background.

While a number of possible retaliatory measures are being considered, the Government's instruction to this Department to obtain information is directed at the effects of implementing a measure which is already on the UK statute book. This provision, Section 812 of the Income and Corporation Taxes Act 1988, would deprive certain US corporations of their right to tax credits on dividends payable from UK subsidiaries. The extent to which US corporations would be affected would depend on which of the range of measures in the legislation was approved by Parliament. The Inland Revenue will be writing to UK companies that are, or may be, subsidiaries of US corporations to obtain detailed information. But as a preliminary step I am writing to US corporations which appear to have subsidiaries in the United Kingdom. My purpose in doing so is to outline the effects of the legislation so that US

parent corporations can consider whether they would be affected by the legislation and if so to what extent. If you consider that your corporation would not be affected by the legislation and you wish to inform my Department direct, that will avoid needless correspondence. If you think that your corporation would, or might, be affected, you may wish to write to me direct or you may wish to give the information to your UK subsidiary so that it can reply to the enquiries it will be receiving.

To assist you in assessing the possible impact of §812 on your corporation it might help if I gave a brief description of its provisions.

This legislation was passed in 1985. It would withdraw the right to tax credits payable to a US Corporation that, either alone or together with its associates, controls at least 10% of a United Kingdom company. In its current form §812 denies tax credits that would normally be payable to US corporations if they have a "qualifying presence in a unitary state". At present California would be a "unitary state" for this purpose. What amounts to a "qualifying presence" can be defined in three different ways under the legislation. A corporation has a qualifying presence in a unitary state if it, or a corporation with which it is associated:

- has its principal place of business is in a unitary state, and that place includes both the place where the central management and control is exercised and the place where the immediate day-to-day management is located, or
- is subject to tax on its income or profits in a unitary state, or
- has 7½% or more in value of its US property, pay roll or sales attributable to or derived from a unitary state.

The Treasury Order that would bring §812 into force would specify which definition was to apply. A corporation is

associated with another corporation at a given time if, at that time or at any other time within six years previously, one of the two has control of the other, or both are under the control of the same person or persons (Sections 812(5)(d) & 416(1) Income and Corporation Taxes Act 1988).

The legislation also allows for the provisions to be applied retrospectively. In March 1989 the UK Government stated that the legislation could be applied to dividends paid after 31 December 1989. In that case the tax credit would have to be repaid and the recipient corporation would become liable to a fine equal to twice the amount of the original credit. In addition interest would be charged at the rate of 9% per annum.

I hope that this letter has been helpful in explaining the provisions of §812. I also hope that it will enable you to assess whether or not §812 would affect your corporation if it were implemented, and if so to what extent. As I said earlier in this letter, the Inland Revenue will be writing to UK subsidiaries of US corporations for the information which we have been asked to obtain. But if you would like to write to this Department direct as suggested above, or would like further information, please contact Suzanne Wallace, Room G17, Strand Bridge House, 138-142 Strand, London, WC2R 1HH, telephone 44 71 438 6118, fax 44 71 438 6865.

Yours faithfully,

IR SPENCE

Finance Director
[address]

25 June 1993

Dear Sir/Madam,

UNITARY TAXATION AND UNITED KINGDOM DIVIDENDS

As you may know, the UK Government announced in May that they will have to take retaliatory measures if there is not a satisfactory resolution of the problem of the internationally opposed unitary tax on foreign owned companies in California by the end of the year. This could affect your company. I enclose a copy of the press release issued on the day of the announcement, which reproduces the Chancellor's statement in full and gives some of the background.

While a number of possible retaliatory measures are being considered, the Government has instructed the Inland Revenue to obtain information about the effects of implementing a measure which is already on the UK statute book. Retaliatory legislation was enacted in 1985 and is now Sections 812 to 815 of the Income and Corporation Taxes Act 1988. As yet, it has not been put into effect. I would like to explain how your company may be affected and to ask you for specific information about your company and the companies with which it is associated. I have already written to your parent corporation in the United States advising it that I am making this approach.

If Section 812 were to come into force, it would withdraw the right to tax credits payable to a US corporation that, either alone or together with its associates, controls at least 10% of a UK company. In its current form, Section 812 denies tax credits that would normally be payable to US corporations if they have a "qualifying presence in a unitary state". At present California would be a "unitary

state' for this purpose. What amounts to a "qualifying presence" can be defined in three different ways under the legislation. A corporation has a qualifying presence in a unitary state if it, or a corporation with which it is associated:

- has its principal place of business in a unitary state, and that place may be either the place where the central management and control is exercised or the place where the immediate day-to-day management is located, *or*
- is subject to tax on its income or profits in a unitary state, *or*
- has 7½% or more in value of its US property, payroll or sales attributable to or derived from a unitary state.

The Treasury Order bringing Section 812 into force would specify which definition was to apply.

It seems that dividends paid by your company would fall within the provisions of Section 812, as currently drafted. From our records it appears that at least 10% of your company is controlled by a US Corporation(s) that has, or is associated with a Corporation(s) that has, a qualifying presence in California under at least one of the definitions set out in Section 812. In the annex to this letter I set out the information that the Inland Revenue needs to check whether this assumption is correct. In the absence of information to the contrary, Section 812, if it came into effect, would oblige us to assume that dividends paid by your company would not be entitled to attract UK tax credits.

The legislation also allows for the provisions to be applied retrospectively. In March 1989 the UK Government stated that the legislation could be applied to dividends paid after 31 December 1989. In that case, the tax credit would have to be repaid and the recipient corporation would also become liable to a fine equal to twice the amount of the original credit. In addition interest would be charged at

the rate of 9% per annum from the date when the original credit was paid. If the tax credits and the fine are not paid by the original recipient, Section 813(6) allows recovery to be made from connected persons. Clearly this would include your company. Furthermore, the ability of your company to set-off payments of advance corporation tax against its liability to corporation tax, or that of a subsidiary, may be limited under Section 813(6)(b).

I should also mention that there are provisions that are designed to prevent the avoidance of Section 812. Section 814 addresses arrangements for transferring profits in a form other than the payment of a dividend. It is widely drafted and payments caught by its provisions would not be allowable for UK tax purposes. Section 815 gives the Board of Inland Revenue powers to inspect documents in order to check whether the provisions of Sections 812 to 814 apply to the foreign parent of a UK company or any company associated with it.

I hope you have found this letter helpful as an explanation of Sections 812 to 815 and that it will help you when providing the information asked for in the attached annex. Finally, I should say that the Government has expressed the hope that action will be taken in the United States, before the end of the year, to resolve the problem of unitary taxation.

Yours faithfully,

IR SPENCE

ANNEX—A REQUEST FOR INFORMATION

1. Please provide the full names and addresses of any person who has been a shareholder in your company since 31 December 1989. For each such shareholder please state:

a. The number and type of shares held by that person on 1 January 1990 or at the time that the shareholder first acquired shares in your company if that is later.

b. Any changes in the number or type of shares held by that person since 1 January 1990 or the date on which the shareholder first acquired shares in your company if that is later.

c. If the shareholder is a body corporate the place of incorporation.

2. Please detail the dividend payments, of whatever kind, made to each shareholder since 31 December 1989, stating:

a. The date on which each dividend was paid.

b. The amount of dividend paid to each shareholder listed in the reply to question 1 that is a United States corporation and which either alone or together with one or more associated corporations, at the time the dividend was paid, controlled, directly or indirectly, at least 10 per cent of the voting stock of your company.

c. The amount paid by your company in respect of a shareholder's entitlement under a double taxation agreement to payment of the excess of the tax credit relating to that dividend over its liability to income tax, and the date on which such amounts were paid.

3. For any shareholder listed in reply to question 1 that is a body corporate:

a. Please state all the names and addresses of any other bodies corporate with which it has been associated since 31 December 1989, wherever incorporated.

b. Detail at what times since 31 December 1989 they have been so associated and the places of incorporation of the associated bodies corporate.

A corporation is associated with another corporation at a given time if, at that time or at any other time within six years previously, one of the two has control of the other, or both are under the control of the same person or persons (Sections 812(5)(d) & 416(1) Income and Corporation Taxes Act 1988).

4. For each shareholder listed in reply to question 1 which is a United States corporation, and for each other body corporate which is associated with such a United States corporation, wherever incorporated:

a. Please state if it is, or has been at any time since 31 December 1989, a member of a group and if the answer is "yes" please also:

b. State the full names, addresses and place of incorporation of the other members of the group on 1 January 1990, or at the time the body corporate in question joined the group if later.

c. List all subsequent changes to the membership of the group, including changes of names, or addresses of any members of the group.

d. List the periods, ending after 31 December 1989, that the members of the group of which the corporation is a part made up their accounts. Please provide copies of the group accounts for each such period. Copies of group structure charts for these periods should also be submitted.

e. State if the proportions, by value, of the group's property, payroll or sales situated in, attributable to, or derived from the State of California equalled or exceeded $7^1/_2\%$ of its total US property, payroll or sales, in any period, ending after 31 December 1989, for which the

members of the group made up their accounts. If so, please set out when this was so.

f. State the current proportion, by value (defined below), of the group's property, payroll and sales situated in, attributable to, or derived from the State of California as a percentage, in each case, of its total US property, payroll or sales.

For the purposes of Section 812 Income and Corporation Taxes Act 1988 "group" and "member of a group" are to be construed in accordance with Section 272(1) Income and Corporation Taxes Act 1970, now Section 170(2) et seq., Taxation of Chargeable Gains Act 1992, except that "51%" is to be substituted for "75%" and references to "a company" is not limited to a company incorporated under the laws of the United Kingdom or resident here.

The value of the property, payroll or sales of a company is the value as shown in its accounts for the period in question. For this purpose the value of any property consisting of an interest in another member of the group or of any sales made to another such member shall be disregarded (Section 812(4)(b)).

5. For any shareholder that is a United States corporation, and for any other body corporate that is associated with such a United States corporation please state, for periods since 31 December 1989 during which the body corporate was a shareholder or associated with a shareholder, in which State the central management and control of the corporation was exercised and, if different, where the immediate day-to-day management of its affairs was conducted.

6. For any shareholder that is a United States corporation, and for any other body corporate that is associated with such a United States corporation, please state, for periods since 31 December 1989 during which the body corporate was a shareholder or associated with a shareholder, if the

corporation was liable to Californian State taxes in respect of its income or profits. If the corporation has been so liable, please explain on what basis, for what periods and to what tax.

Appendix C

June 30, 1993, Resolution of the Finance Committee of the German Bundestag concerning unitary taxation in the State of California.

The Finance Committee of the German Bundestag has today discussed the problem of unitary taxation as applied in the State of California to the cross-border apportionment of profits between associated enterprises.

The Finance Committee notes that this method of taxation used by the State of California is based on a flat-rate allocation of profits that is inconsistent with the internationally accepted arm's-length principle, that such allocation of profits can result in substantial double taxation and that it imposes disproportionate burdens on enterprises in discharging their tax filing obligations. In the opinion of the Committee, a "water's-edge" rule under which enterprises operating on an international basis can gain exemption from worldwide unitary taxation of their income only on payment of a large fee is also in conflict with the principles of taxation as agreed in the German-American Convention for the Avoidance of Double Taxation.

The Finance Committee notes with regret the departure of the new U.S. administration from the course followed by former U.S. administrations for more than 20 years. The rejection of unitary taxation has always been and still is both a reflection of mutually agreed positions and a necessary means of ensuring, among other things, that economic relations between the United States of America and the Federal Republic of Germany continue to function smoothly and without disruption.

The Finance Committee calls upon the new U.S. administration to return to the common approach adopted by all other OECD countries and to urge the State of California to relinquish, in the interest of avoiding disruptions of

international trade, the system of unitary taxation that is rejected by all other industrialized nations.

The Finance Committee requests the German government to take immediate steps to consider the application of retaliatory measures should it prove impossible to achieve a satisfactory solution to the problem of unitary taxation within a reasonable period of time. In making this request, the Finance Committee proceeds on the assumption that it will be possible to reach a satisfactory solution by the end of 1993.

Appendix D

September 15, 1993, Statement of the Chancellor of the Exchequer, Rt. Hon. Kenneth Clarke, Q.C., M.P.

I am greatly encouraged to learn that California has passed legislation to modify its unitary tax law. This development is a vindication of the Government's decision to set a definite time limit for the implementation of retaliatory measures. But for the Government's action it is clear that there would have been no progress in California. The approach that California has now adopted has been designed to bring to an end the problem of unitary tax for UK owned companies in California. However, given the defects that remain in the law, it will be important to ensure that the spirit of the new approach is followed in the detailed regulations and in the practical application of the law. The UK will therefore defer retaliatory action and will retaliate only if it is found that the legislation is being applied in a way which exposes UK owned companies to damage from taxation that is inconsistent with the arm's length principle. I am informing Secretary Bentsen accordingly.

While the legislation in California is a significant step forward, on its own it does not provide a complete solution to the unitary tax problem. For a complete solution it will be necessary to have the internationally accepted arm's length principle endorsed, on a permanent basis, as the only valid method of taxing foreign companies in any State. Success for the Barclays' case in the Supreme Court would achieve this. The Government will continue strongly to support Barclays' case. I hope it will succeed. If it does not, the UK will have to retain its retaliatory powers in reserve as a barrier against the possibility that States might damage UK owned companies by the imposition of unitary taxation at some time in the future.

Appendix E

Demarche on Unitary Taxation, September 24, 1993, from the Embassy of Belgium, Presidency of the European Community, on behalf of the Member States of the European Community, and from the Delegation of the Commission of the European Communities.

EMBASSY OF BELGIUM
WASHINGTON, D.C.

The Honorable
Warren Christopher
Secretary of State
Washington, D.C. 20520

Dear Mr. Secretary,

We have the honor to convey to you the attached note on unitary taxation on behalf of the Governments of the Member States of the European Community and the Commission of the European Communities.

We avail ourselves of this opportunity to renew to you the assurances of our highest consideration.

s/ Juan Cassiers	s/ Andreas van Agt
Ambassador of Belgium	Ambassador of the
EC-Presidency	Delegation of the Commission
	of the European Communities

UNITARY TAXATION

1. The Member States of the European Community and the European Commission have the honour to refer to their note of 26 March 1993 in which they expressed their strong opposition to worldwide unitary taxation and urged the United States Government to support the Barclays petition for certiorari to the United States Supreme Court. The Member States, together with eight other major trading partners of the United States, subsequently supported the Barclays Petition in an amicus curiae brief dated 22 April 1993.

2. The Member States and the European Commission note that the State of California has since passed legislation to modify its unitary tax law. While this legislation is an improvement, the Member States and the European Commission do not consider that the unitary tax problem is solved. Worldwide unitary taxation, which is contrary to the internationally agreed arm's length principle, is still the basis of the tax system in California. A complete solution will require the arm's length principle to be established as the only legitimate basis of taxing foreign companies in any state.

3.The Member States and the European Commission therefore continue strongly to urge the United States Government to support the Barclays petition for certiorari to the United States Supreme Court.

Appendix F

Demarche on Unitary Taxation, October 14, 1993, from the British Embassy on behalf of the Member States of the European Community and the governments of Australia, Austria, Canada, Finland, Japan, Norway, Switzerland and Sweden.

BRITISH EMBASSY
WASHINGTON, D.C.

The Honorable
Warren M. Christopher
Secretary of State
Department of State
7th Floor
Main State Department Building
2201 C Street, N.W.
Washington, D.C. 20520

Dear Mr. Secretary,

With the agreement of the other countries concerned, I have been asked to convey to you the attached note on unitary taxation on behalf of the governments of the member states of the European Community, and of Austria, Australia, Canada, Finland, Japan, Norway, Sweden and Switzerland.

Yours sincerely,

s/ Robin Renwick

UNITARY TAXATION

The 12 Member States of the European Communities: Belgium, Denmark, France, Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and United Kingdom; and the governments of Australia, Austria, Canada, Finland, Japan, Norway, Sweden and Switzerland ("the 20 countries") have the honour to refer to their brief for the Supreme Court of the United States in the case Barclays Bank plc v. Franchise Tax Board, dated 22 April 1993.

The countries concerned note that, since that date, the State of California has passed legislation to modify its unitary tax law. While this legislation is an improvement, the countries concerned do not consider that the unitary tax problem is finally resolved. Worldwide unitary taxation is contrary to the internationally agreed arm's length principle embodied in the bilateral tax treaties of the United States and disruptive of international economic relations. A complete solution would require the arm's length principle to be established as the only legitimate basis of taxing foreign companies in any state.

The 20 countries regret therefore that, in his brief filed on 7 October 1993, the Solicitor General of the United States does not support the Barclays petition for a writ of certiorari.